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Plaintiff in Error,

vs.

WILLIAM F. FITZGERALD,
MAYOR, CHAIRMAN, &c.,
JAMES W. FORBES and
WILLIAM P. FORBES,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT B. SMITH, and
ROBERT L. WORD,
Attorneys and Solicitors for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

NO. 145.

WILLIAM A. CLARK,

Plaintiff in Error.

vs.

WILLIAM F. FITZGERALD,
MEYER GENZBERGER,
JAMES W. FORBIS and
WILLIAM P. FORBIS,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT B. SMITH and ROBERT L. WORD,
Attorneys and Solicitors for Plaintiff in Error.

STATEMENT OF THE CASE.

This cause comes here on a writ of error directed to the Supreme Court of the State of Montana, and the questions involved grow out of the following state of facts.

The plaintiff in error is the owner and in possession of the "Black Rock" lode mining claim situated in the "Summit Valley" mining district in Silver Bow County, Montana.

The defendants in error own two thirds interest, and the plaintiff in error one third interest in the "Niagara" lode mining claim situated in the same district and county. The "Niagara" lode lies along side of the "Black Rock" lode so that the south side line of the "Niagara" forms or is a part of the North side line of the "Black Rock" lode, as shown in the diagram on page 17 of the agreed printed record.

The "Black Rock" lode is the older of the two locations. As appears from the pleadings in the cause and the diagram above referred to the vein or lead crosses the east end line and south side line of the "Niagara" lode 513 feet west of the north east corner of the "Black Rock" lode and dips to the south and under the surface of the "Black Rock" lode claim.

The plaintiff in error entered upon that part of the vein, east of the point where it crosses the division side line between the "Black Rock" and "Niagara" lode claims and extracted ore from the said vein on its dip under the "Black Rock" lode at the point above described, and which is designated on the diagram at page 17 of the printed record as "ore bodies."

Thereupon the defendants in error, who as stated supra own two thirds ($\frac{2}{3}$) interest in the "Niagara"

lode claim brought an action asking for an accounting and judgment for two thirds the value of the ore extracted by the plaintiff in error. Judgment was rendered against the plaintiff in error for the sum of $27,-242.54, being two thirds the value of the ore extracted and for ($234.50) two hundred thirty four and 50-100 dollars the cost of the suit.

An appeal was taken to the Supreme Court of the State and the judgment of the lower Court was affirmed in the opinion set forth in the record beginning on page 17 printed record.

The questions presented by this record for decision are raised solely by the judgment roll consisting of the pleadings and judgment of the lower Court and opinion of the Supreme Court of the State.

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

It appears from the pleadings in the above entitled cause that the defendants in error above named are the owners of an undivided two thirds of the "Niagara" quartz lode claim, and the plaintiff in error is the owner and in possession of the "Black Rock" quartz lode claim; and it further appears from said pleadings that the north side line of the "Black Rock" lode claim is also the south side line of the "Niagara" lode claim, owned in part by the defendants in error; and

it further appears from the pleadings in said cause and from the judgment rendered therein that the apex of the vein or lode of the "Niagara" claim passes through the east end line of said claim and running thence westerly at a point 513 feet west from the northeast corner of the "Black Rock" claim the apex of said vein or lode of the "Niagara" claim passes through the south side line of said "Niagara" lode or claim, and notwithstanding such fact, the Supreme Court of the State of Montana decided that the defendants in error had a right to follow that portion of said vein which had its apex inside of the surface lines of the "Niagara" claim on its dip or pitch into the earth to the south, underneath and within the surface lines of the "Black Rock" claim extended vertically downward, claimed, owned and possessed by the plaintiff in error, and in this the Court erred.

II.

The said Supreme Court of Montana erred in deciding that where the apex of a vein, lode, or ledge passed diagonally through one end line and one side line of the "Niagara" claim owned by defendants in error, that said defendants in error had a right to follow the said vein or lode on its dip into the earth outside of their surface lines extending vertically downward and into and underneath the surface and within the surface lines of the "Black Rock" claim extend-

ing vertically downward, the said last-named claim being owned and possessed by the plaintiff in error.

III.

The said Supreme Court of Montana erred in deciding that where the apex of a vein or lode crosses two surface lines of a mineral claim, which said lines are not parallel to each other, that the owners of such a vein or lead have the right to follow such a vein or lode on its dip into the earth underneath the surface and within the surface lines of an adjoining claim.

IV.

The said Supreme Court of Montana erred in disregarding that portion of section 2320 of the Rev. Stats. of the United States, requiring the end lines of each location or claim to be parallel to each other.

V.

The said Supreme Court of Montana erred in refusing to hold that where the apex of a vein or lode crosses one end line and one side line of a claim, such side line becomes in effect an end line.

VI.

The said Supreme Court of Montana erred in refusing to follow the law as announced by the Supreme Court of the United States in case of King vs. Amy and Silversmith Co., 152 U. S., 222, construing sec-

tions 2320 and 2322 of the Rev. Stats. of the United States.

VII.

The said Supreme Court of Montana erred in attempting to lay down a rule by which the lines of a mining claim or mine can be readjusted, so as to give the holder thereof extralateral rights and permit him to follow his vein on its dip into the earth without having parallel end lines crossed by the apex of the vein or lode.

ARGUMENT.

This cause presents to this Court for the first time a new question for adjudication. In some respects analogous questions, have already been settled by this tribunal. but the exact question here presented has never been decided.

See Tyler Mining Co., vs. Last Chance Mining Company, 157 U. S. 696.

As stated in the preceding part of this brief and as shown on page 2 of the printed record, the apex of the vein or lode of the "Niagara" claim crosses the east end line and the south side line of said "Niagara" claim. It also appears from the amended complaint on page 2 of the printed record that the plaintiff in error entered upon said vein upon its downward course or dip into the earth and extracted there-

from certain valuable ores for an accounting of which this action was brought; in order that the Court may clearly have before its mind that part of the complaint, we quote as follows:

"That the said "Niagara" lode claim is a quartz "lode claim, and as such embraces a quartz vein the "top or apex of which crosses the south line of the "" Niagara" lode claim 560 feet in a westerly direc- "tion, from the northeast corner No. 1 of the "Black " Rock" lode claim, lot No. 53, in T.3 N., R. 7 W., *the "said south line of the "Niagara" lode and the north line "of the "Black Rock" lode at the point of departure of "said vein being identical;* and the said vein from the "said point of entering the south line of the said "Ni- "agara" lode claim continues, with its top or apex "within the surface lines of the "Niagara" lode claim, "*easterly until it crosses the end line of the said "Ni- "agara" lode claim*, and that the said vein in its down- "ward course or dip departs *from within the surface "lines* of the said "Niagara" lode claim *into and under* "the said "Black Rock" lode claim which lies south "of, and adjoining the said "Niagara" lode claim.

"That heretofore, to-wit, on or about the 1st day of "March, 1890, as plaintiffs allege on information and "belief, the said defendants without plaintiff's con- "sent, by underground workings, levels, winzes, stopes "and shafts, entered upon the said vein *upon its "downward course or dip*, and began to extract, and

"ever since have continued to extract, and are now "extracting therefrom large quantities of ore, which "at the date of the commencement of this action "amounted in value to the sum of two hundred and "thirteen thousand dollars, and which ore was ex- "tracted from the vein hereinbefore described upon "its *downward course or dip*, and on that portion "thereof which has its apex upon the "Niagara" lode "claim hereinbefore described."

It will be seen from the above quotation that the ore taken by the plaintiff in error was from that portion of the vein which had its apex within the surface lines of the "Niagara", but the ore was taken from the vein on its downward course or dip, and as disclosed by the amended complaint, the vein dipped to the south and underneath the "Black Rock" claim, and it was upon this dip or downward course of the said vein that the plaintiff in error entered and extracted the ore sued for.

It is not contended that the plaintiff in error entered upon any part of the vein within the surface lines of the "Niagara" lode. If we apply to the amended complaint of the defendants in error, the rule usual in the construction of pleadings, that the pleadings or statements of a party are to be taken or construed most strongly against the pleader, it is apparent that the ore was taken from that portion of the vein which had its apex in the "Niagara" claim, but from that

part of the vein included within the surface lines or side lines of the "Black Rock" claim extended vertically downward; in other words, from the amended complaint it cannot be gathered that the plaintiff in error took one ounce of ore from any part of the vein included within the surface lines of the "Niagara" claim extended vertically downward, and to further strengthen our position as to where the plaintiff in error procured the ore, we will quote from the answer of W. A. Clark to the amended complaint, beginning with the last paragraph on page 4 of the printed record which reads as follows:

"Defendant, further answering, avers the fact to be "that said "Niagara" lode claim was not located on "or along the course or strike of any vein, the "top or apex of which lies within the lines of "said lode claim, but was located across said "veins and across the vein from which plaintiffs "claim that defendants (plaintiff in error) have ex- "tracted ore belonging to plaintiffs, and that by "reason thereof, the side lines of said "Niagara" lode "claim, became and are the end lines of said "Niag- "ara" lode claim, and should be drawn down verti- "cally, and for the reason that said side lines became "the end lines of said lode claim plaintiffs have no "right, in case said veins or any of them should upon "their downward course or dip depart from the side "lines of said "Niagara" lode claim, and under or

"into said "Black Rock" lode claim, to follow the "same in said downward course or dip into or under "the side lines of said "Black Rock" claim." * * *

"Denies that said plaintiffs or any of them, as own- "ers or otherwise, were or are entitled to the vein or "lode upon which the alleged trespass was committed, "or are entitled to the same in its downward course "outside of the sideplanes of the surface location of "said "Niagara" lode claim, drawn down vertically, "or are entitled to any part or portion of the ore of "said vein *outside of the surface lines of said "Niag- "ara" lode claim*, and especially that portion thereof "from which it is alleged that the said quartz and ore "was taken and removed by the defendants in this "action." * * *

"That as such lessee the defendant went into the act- "ual possession of said "Black Rock" lode claim, and "was entitled to the possession of the same, with the "right to mine and extract quartz, rock, or ore there- "from without let or hindrance from the other defend- "ants in this suit, and was entitled to and did man- "age, mine and conduct said "Black Rock" lode "claim during all the time of the alleged trespass set "out in plaintiffs' complaint, and long prior thereto, "and has, before the commencement of this suit and "before the time of the supposed trespass mentioned "in said complaint, continually, as such lessee, mined "and extracted quartz and ore from said "Black

"Rock" claim, and particularly the quartz and ore "mentioned in said complaint and which is claimed "by plaintiffs, and which constitutes the supposed "trespass set out in plaintiffs' complaint." * * *

"That this defendant at the time of mining and ex- "tracting the ore from said "Black Rock" lode claim, "which constitutes the supposed trespass set out in "plaintiffs' complaint, acted in good faith and then "believed and still believes that all the said ore was "mined and extracted from ledges or veins, the tops "or apexes of which lie inside of the said "Black "Rock" lode claim."

"It is admitted by the pleadings in said cause, that the "Black Rock" lode claim was prior in time of location and patent."

It will be noticed from the quotation of the above answer that the ore was taken *from the "Black Rock" lode claim.* This allegation appears more than once in the answer, and is not denied in the replication. The only denial in the replication is a denial that the *vein or lode* from which the plaintiff in error took the ore had its *top or apex* within the side lines of the "Black Rock" claim drawn vertically downward. No where in the replication is there any claim that the plaintiff in error went out side of the surface lines of the "Black Rock" claim to procure the ore, for which suit was brought.

The question thus presented for determination by this Court by the pleadings in this case is as follows: Where a vein or lead of quartz in place crosses one end line of the surface location as marked upon the ground and also crosses one of the side lines of said location, has the owner or patentee of such location a right to follow the said lead, or so much thereof as has its apex within the surface lines of his location on its pitch or dip into the earth outside of planes drawn vertically downward through the surface lines of his location?

If such a claimant or locator has no right to go beyond planes drawn vertically downward through his surface lines, then the judgment in this cause is incorrect and should be reversed.

If our view of the law is correct, the pleadings present a case where judgment should have been rendered for the plaintiff in error. In fact the complaint does not state facts sufficient to support the judgment.

From the complaint set out in the printed record, pages 1 to 3 inclusive, it is apparent that the vein or lode claimed by the owners of the "Niagara" claim passes through the east end line and the south side line of said claim. These two lines are not parallel but are almost at right angles to each other as disclosed by survey set out in the amended complaint.

Section 2320, Rev. Stats. of the United States requires that "the end lines of each claim shall be parallel to each other." And Section 2322 provides that the locators or owners of any mining claim "shall be entitled to the veins or lodes, the top or apex of which is within the surface lines extended vertically downward throughout their entire dip, even though they may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. "But their right of possession to such outside part of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described through the end lines of their location, so continued in *their own direction* that such planes will intersect such veins or ledges."

By Section 2320 of the Rev. Stats. of the United States, it will be seen that the first requirement of the Statute in respect to the rights of locators is, that the *end lines* of the claim *shall be parallel*, and that so much of the vein as lies between planes drawn vertically downward through the end lines until the ledge is intersected by such planes belongs to the locator on its dip into the earth. The lines designated by the locator in his surface location *as end lines*, are not necessarily such; it frequently happens that the side lines are in fact the end lines of the lode or vein. See

Iron Silver Mining Company vs. Elgin Mining Co., 118 U. S. 196.

Iron Silver Mining Company vs. Elgin Mining Co., 14 Fed. Rep. 377.

Flagstaff Mining Company vs. Tarbett, 98 U. S. 463

Terrible Mining Company vs. Argentine Mining Co., 122 U. S. 478.

King vs. Amy & Silversmith, 152 U. S. 222.

Tombstone Mining Company vs. Way Up Mining Co., 25 Pac. Rep. 794.

From the foregoing authorities it will be seen that often those lines which are designated as side lines become end lines, by reason of the fact that the vein or ledge crosses them and departs from the claim never to return inside the surface boundaries. It frequently happens that the vein crosses lines which are not parallel, and which by reason of the ledge crossing them and departing from the claim, become end lines. The law does not require parallelism in the side lines of a claim. If then side lines which are not parallel become end lines by reason of having been laid across the strike of the vein, has the claimant any extra lateral rights? In the Amy and Silversmith case, recently before the Supreme Court, it so happened that the side lines of the claim were parallel, and in fact they were more nearly parallel to the general strike of the vein or ledge than the original end lines, but the Supreme Court held that the side lines became the end lines and that the owners

had *no extra lateral* rights on their vein, but were confined to the amount included within planes passed vertically downward through the surface lines of the Amy location.

What rights then can a claimant have whose location is so made that one of the lines he designates as an end line, and one of his side lines cross the vein or ledge so that the same departs from the claim through one end line and one side line? This question would seem to be answered by Section 2322, Rev. Stats. of the United States, which says: "But "this right of possession to such outside parts of "such veins or ledges shall be confined to such por- "tion thereof as lie between vertical planes drawn "downward as above described through the end lines "of their location so continued in their own direc- "tion that such planes will intersect such veins or "ledges."

As the two lines of the "Niagara" claim through which the vein passes as presented by the pleadings in the case at bar, intersect each other almost at right angles the planes drawn downward vertically through them would also intersect at the same angle, and the rights of defendants in error would be restricted to so much of the lead as lies within the planes drawn vertically downward through the two surface lines intersected by the apex of the vein or lode. As the end lines of the "Niagara" claim, or rather the sur-

face lines of the "Niagara" crossed by the vein or lode *are not parallel*, Have the respondents then any extra lateral or extra territorial right? This question is answered in the negative by the following authorities:

Iron Silver Mining Co. vs. Elgin Mining Co., 118 U. S. 196.

Iron Silver Mining Co. vs. Elgin Mining Co., 14 Fed. Rep. 377.

Montana Company, Limited vs. Clark et al., 42 Fed. Rep. 626.

King vs. Amy & Silversmith Consolidated Co. 152 U. S. 222.

Colorado Central Consolidated Co. vs. Turck, 50 Fed. Rep. 888.

Tombstone Mill and Mining Co. vs. Way Up Mining Co. 25 Pac. Rep. 794.

Blue Bird Mining Company vs. Largey, 49 Fed. Rep. 291 and

McCormack vs. Varnes et al, 2 Utah 355.

In the case of Tombstone Mining Co. vs. Way Up Mining Co. supra, the Court says: "Section 2322 "Rev. Stats. of the United States, gives the owner "of a mining claim the right to follow his vein or "lode on its dip only when such vein or lode dips— "that is departs from a perpendicular position—sub- "stantially at right angles with the strike of the vein "or lode, and does not allow him to follow the vein "outside of his claim on the course or strike of the

"vein in any case. If the vein crosses the side lines "on its strike such lines become end lines and termi- "nate the owners right to follow the vein in that di- "rection."

This question was fairly before the Supreme Court of the United States in the case of Iron Silver Mining Co. vs. Elgin Mining Co. 118 U. S. 196, and was fully discussed and considered, and Mr. Justice Bradley, speaking with reference to the extra lateral rights of lode claimants under Section 2322, Rev. Stats of the United States, says: "This section appears sufficiently "clear on its face. There is no patent or latent ambig- "uity in it. The locators have the exclusive right of "possession and enjoyment of all the surface includ- "ed within the lines of their locations; and the loca- "tion by another section must be distinctly marked "on the ground so that its boundaries can be readily "traced. They have also the exclusive right of pos- "session and enjoyment of all veins, lodes and ledges "throughout their entire depth the top or apex of "which lies inside of such surface lines extended "downward vertically, although such veins, lodes or "ledges may so far depart from a perpendicular in "their course downward as to extend outside the ver- "tical side lines of said surface locations. The sur- "face side lines extended downward vertically deter- "mine the extent of the claim except when in its de- "scent the vein passes outside of them, and the out-

"side portions are to lie between vertical planes "drawn downward through the end lines. *This means "the end lines of the surface location*, for all locations "are measured on the surface. The difficulty arising "from the section grows out of its application to "claims where the course of the vein is so variant "from a straight line that the end lines of the sur- "face location are not parallel; or, if so are not at a "right angle to the course of the vein. This diffi- "culty must often occur where the lines of the sur- "face location are made to control the direction of "the vertical planes. The remedy must be found, "until the Statute is changed, in carefully making "the location, and in postponing the marking of its "boundaries until explorations can be made to ascer- "tain as near as possible, the course and direction of "the vein. * * *

"If the first locator will not or cannot make ex- "plorations necessary to ascertain the true course of "the vein, and draws his end lines ignorantly, he "must bear the consequences. * * * Under the "act of 1866, parallelism in the end lines of a surface "location was not required. But where a location "has been made since the act of 1872, *such parallelism "is essential to the existence of any right in the locator "or patentee to follow his vein outside of the vertical "planes drawn through the side lines.* His lateral "right by the statute is confined to such portion of

"the vein as lies between such planes drawn through "the end lines and extended in their own direction, "that is, *between parallel* vertical planes, it can em- "brace no other portion."

This doctrine was further commented upon with approval by Judge Knowles of the United States Circuit Court for Montana in the case of Montana Company, Limited vs. Clark et al., 42 Fed. Rep., 626, where citing the case of the Iron Siver Mining Co. vs. Elgin Mining Co. supra, the learned Judge said:

"This language is decisive of the defendant's right "to follow their vein outside of their side lines. "Having *no parallel end lines*, they cannot do it. *** "Had the defendant so located the Hopeful Claim "that it would have had parallel end lines there can "be no doubt but they would have been entitled to "follow any vein which may have its apex within its "limits, and which *passed through both end lines in "its strike.*"

This language is as plain as it is possible to make it. There can be no ambiguity or double meaning to it. The vein on its strike must pass through both end lines, which must be parallel in order to give the claimant any extra lateral or extra territorial rights to follow his vein on its dip into the earth. In the cause at bar, there can be no extra lateral rights, because the vein or ledge confessedly, according to the pleadings, only passes through one of the end lines of

the surface location and through one side line, all of which clearly appears by an inspection of the amended complaint. Vertical planes passed through these two end lines of the vein would confine the claimants of the "Niagara" to so much, and such parts of their vein or ledge, as would be included within their surface location lines extended downward vertically.

Keeping in mind that the law requires the end lines to be parallel as one of the conditions necessary to give extra lateral rights, and then remembering the universal rule established by all the Courts, that where a vein or ledge crosses a side line such side line becomes an end line, we see no way in which a construction can be placed on this complaint which would present facts sufficient to constitute a cause of action or support the judgment.

Hence we contend the Court erred as specified by us in the record.

It was pertinently said by the Supreme Court of the United States in the case of Iron Silver Mining Co. vs. Elgin Mining Co. supra, "That it is not the "duty of the Court to make new locations or read-"just the line of a location for a claimant, but to ap-"ply the law as it is to the case presented, and if any "apparent hardship appears, let the locator who did "not, or could not locate his claim with due care bear "the consequences of his own act." We are aware of the fact that there are a few cases of inferior

Courts, at least *not* Courts of last resort, where the Court has undertaken the task of drawing new lines for the claimant and readjusting the location so as to give extra lateral rights. These cases are: The Tyler Mining Co. vs. Last Chance Mining Co. by the Circuit Court of Appeals at San Francisco, 61 Fed. 557, and Del Monte Mining Co. vs. New York and Last Chance Mining Co., 66 Fed. Rep. 212 by Judge Hallett of Colorado, and Consolidated Wyoming Co. vs. Champion Mining Co., 63 Fed. Rep. 540. In each case a writ of error to the Supreme Court of the United States was allowed on this very question of extra lateral right, but unfortunately the point has not been decided by this tribunal, in either of said causes.

It was the doctrine laid down in these three cases that was followed by the Supreme Court of Montana in the case at bar. The opinion of the Supreme Court of Montana in this cause is frank in this, that it acknowledges its views to be not wholly in accord with the decisions of the United States Supreme Court. It says, speaking of the Amy Silversmith case: "We "gave our best endeavor and research in that deci- "sion and arrived at a result which we were willing "to concede was not wholly in accord with the de- "cisions of the United States Supreme Court upon "that subject, but which we believed could, with a "very little effort, be reconciled with those decisions,

"and which we were wholly satisfied was the only "practicable solution of the problem in all its phases, "and which we were also wholly satisfied was fully "within the intent of the United States Mining laws."

Although the decision of the Supreme Court of the State was over-ruled in the Amy Silversmith case by the Supreme Court of the United States, we are told, in the present cause in the opinion of the Supreme Court of Montana, that they are still satisfied with their own opinion in the Amy Silversmith case, and here in the present cause they apply the same doctrine they held in the Amy Silversmith case, and which was reversed by this tribunal upon a proper appeal to this Court.

Let us here refer to the diagram, page 20 of the printed record exhibiting the Amy location and the strike of the vein. It will be observed that the Supreme Court of the State of Montana permitted the owners of the Amy to follow the vein on its dip under the Non-Consolidated claim westwardly to a plane drawn vertically downward through the line E. F. marked on the diagram "courts line." The other plane would be drawn through the point where the apex of the vein crosses the south line parallel to the line E. F. or 600 ft. from corner "I," the south east corner of the diagram. Under this construction as given by the Supreme Court of the State of Montana, the claimants in the Amy could follow all that part of

the vein which has its apex within the lines of the Amy location on its dip to the north and under adjoining claims.

This doctrine was totally reversed by the Supreme Court of the United States in that case, and it was there held that the owners of the Amy had no extra lateral rights, but were confined to so much of the vein as lies within planes drawn vertically downward through the surface lines of the location.

Let us now, for the sake of argument, refer again to the diagram on page 20. Let us shift the location of the claim a little farther to the east until the point E, where the apex of the vein strikes the north side line, shall be just east of corner "N" of the Amy location. Under such conditions, there is no doubt but the opinion of the Supreme Court of the United States would be identically the same as it has already been so ably expressed by this tribunal. Let us then by shifting the location of the claim farther east, until the point E on the diagram is identical with the point N, would the reasoning of the Court be changed? We think not.

Suppose that when the apex of the vein is so shifted westward on the location until the point E should be identical with corner "N" of the Amy location, would it make any difference whatever in the rights of the parties, or the reasoning of the Court if the point E, where the apex crosses the north side line,

should be so adjusted as to cross the west end line, say one foot south of corner "N" of the Amy location? We cannot think the Court could change its reasoning. The only difference would be a slight difference in the angle or degree with which the apex of the vein should strike or cross the several lines of the location.

If this slight variation in the movement of the apex of the vein is sufficient to change the whole reasoning of the Supreme Court in the case of King vs. Amy & Silversmith, then our position may not be tenable, but unless this slight variation on the degree of the strike of the vein should have that effect, then our contention is correct, and the opinion of the Supreme Court of Montana in the cause at bar should be reversed.

Again referring to the diagram on page 20 of the printed record, let us suppose that the location of the Amy lode was so shifted to the east that the point E, where the apex of the vein intersects the north side line of the location, should be exactly west of point "N," the north-west corner of the Amy location. In such a case, the apex of the vein would cross the west end line, and the south side line of the Amy location, and the question thus presented would be identical with the one we are here presenting. Would such shifting of the location in that case work a reversal of the opinion of the Supreme Court of the United

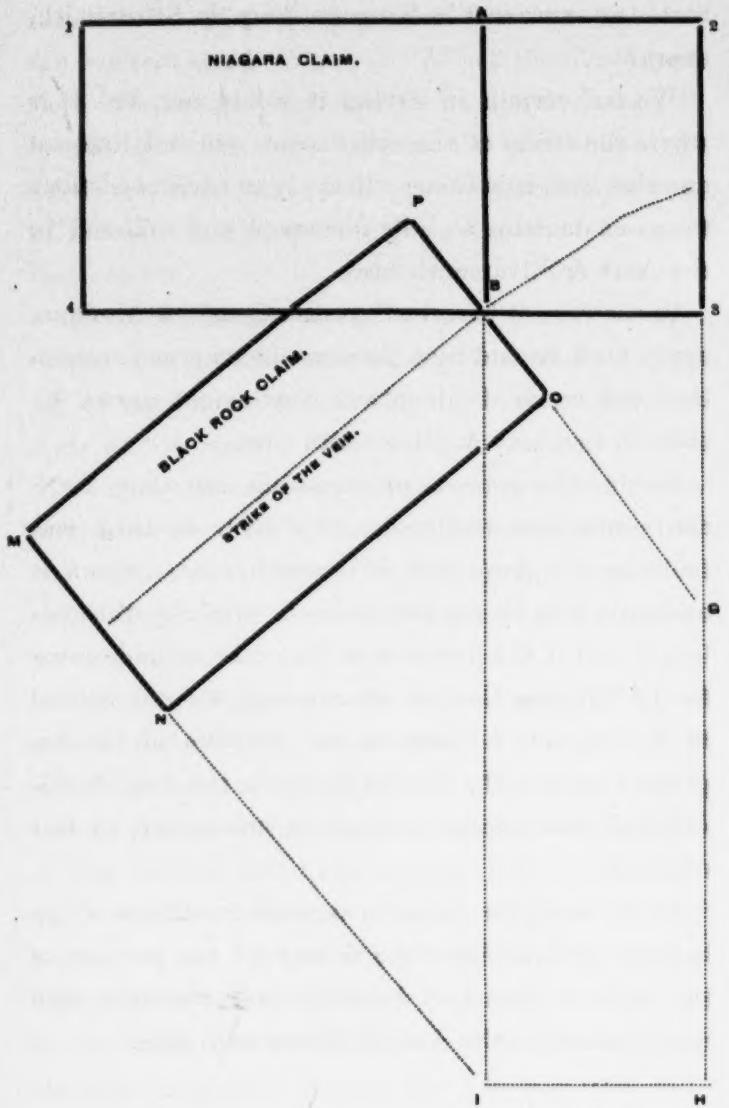
States as expressed in King vs. Amy & Silversmith, supra?

We feel certain in saying it would not, and that where the strike of the vein crosses one end line and one side line, this Court will apply to such conditions the same doctrine so ably discussed and affirmed in the Amy & Silversmith case.

In the case at bar, the Supreme Court of Montana apply for a second time the same doctrine and reasoning, and reach the identical conclusions drawn by them in the Amy & Silversmith case.

By no other process of reasoning can they reach the opinion here rendered, and if their decision was faulty in the Amy and Silversmith case, (which it evidently was by the fact of its reversal by this tribunal) and if the doctrine of that case as laid down by the Supreme Court was erroneous, then it cannot be correct now so long as the decision of the Supreme Court of the United States in the Amy & Silversmith case remains the law as announced by this tribunal.

There are in the present case such conditions which beyond cavil disclosed the fallacy of the position of the Supreme Court of Montana more forcibly than was apparent in the Amy & Silversmith case.


NIAGARA CLAIM.
BLACK ROCK CLAIM.
STRIKE OF THE VEIN.
A
B
P
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H

For illustration, on the opposite page we present a diagram that will exemplify the error into which the Montana Court has fallen, and will illustrate conditions that would frequently arise if the views expressed in the opinion of the Supreme Court of Montana prevail and find lodgment in the jurisprudence of this country.

In the diagram which we present in this brief, instead of placing the "Black Rock" claim along side and parallel with the "Niagara," we present the "Black Rock" as having been located parallel with the strike of the vein, and necessarily at an angle with the "Niagara." Let the figures 1, 2, 3, 4 represent the four corners of the "Niagara," and the letters M, N, O, P, represent the corners of the "Black Rock," the dotted lines crossing through the east end of the "Niagara," and the south side line of said claim, will represent the strike of the vein passing out of the south side line of the "Niagara" at the point B, then the line B X will represent so much of the apex of the vein or lode as lies within the surface lines of the "Niagara." Under the doctrine announced by the Supreme Court of Montana, the owners of the "Niagara" would be entitled to all that part of the vein on its dip to the south into the earth, between planes drawn down vertically through the lines A, B and 2, 3 extended in their own direction to I and H, but under the law as stated in Section 2322

of the Rev. Stats. of the United States, the owner of the "Black Rock" claim, who went upon the public domain outside the lines of the "Niagara" and located his claim in conformity to the law, and parallel with the strike of the vein, has also a right to follow the same vein on its dip into the earth between planes drawn dawn vertically through his end lines M N and O P extended in their direction to the points G and I, and this right he would have without regard to the question of priority of location. See "Flagstaff Mining Co. vs. Tarbett, 98 U. S., p. 468 and 469, where the Supreme Court of the United States uses this language:

"The plaintiff in error contended and requested "the Court to charge, in effect, that having received "a patent for 2,600 ft. in length and 100 ft. in breadth, "commencing at the "Flagstaff" discovery on the lode "at the surface, it was entitled to 2,600 ft. of that lode "along its length, although it diverged from the lo- "cation of the claim and went off in another direc- "tion."

"We cannot think that this is the intent of the "law. It would lead to inextricable confusion. Other "locations correctly laid upon the lode and coming "up to that of the plaintiff in error on either side "would, by such a rule, be subverted and swept "away. Slight deviations of the out cropping lode "from the location of the claim would probably not

"effect the right of the locator to appropriate the "continuous vein, but if it should make a material "departure from his location, and run off in a differ- "ent direction and not return to it, it certainly could "not be said that the location was on that lode or "vein farther than it continued substantially to cor- "respond with it. Of what use would a location be "for any purpose of defining the rights of parties, if "it could be thus made to cover a lode or vein which "runs entirely away from it. Though it should hap- "pen that the locator by sinking shafts to a consid- "erable depth might strike the same vein on its sub- "terranean descent, he ought not to interfere with "those who having properly located along the vein "are persuing their right to follow the dip in a regu- "lar way. So far as he can work upon it and not in- "terfere with their rights, he might probably do so, "but no farther. And this consequence would fol- "low irrespective of the priority of the locations. It "would depend on the question as to what part of "the vein the respective locations properly cover and "appropriate."

There cannot be under the conditions presented in the diagram a possible doubt of the right of the "Black Rock" owner to follow the vein on its dip, and if the Supreme Court of Montana is right, the "Niagara" people will have the right to follow the same vein on the same dip to the same point, and

thus we would have presented the anomalous condition of two claimants owning one and the same part of the vein which is described in the diagram presented in this brief by the quadrilateral section B, G, H, I. They would thus have the right to the same property through opposing titles. This is the logical result of the doctrine announced by the Supreme Court of Montana, the consequence would be "confusion worse confounded." Such absurd conditions cannot result from applying to this case the same rule of construction applied by this Court to all the different analogous cases heretofore determined and ending with the case of King vs. Amy & Silversmith in 152 U. S. One or two of the District Judges of the United States have sought to evade the reasoning of that case and the results which follow from the adoption of the rule laid down by this Court. One of the cases is that of "Tyler Mining Co. vs. Last Chance Mining Co." decided by Judge Beattie, District Judge, and reported in the 71 Fed. Rep. page 848.

Let us for a moment examine the diagram which the learned Judge uses in his opinion on page 849 of the 71 Fed. Rep., and for the sake of argument, let us reverse or change the location of the "Last Chance" claim so that the north end line shall cross the strike of the vein at corner No. 4 of the "Tyler" claim, and let the "Last Chance" location be located along and

parallel with the strike of the vein. What would be the result? If the reasoning of Judge Beattie should be followed, the owners of the "Tyler" claim would have the right to follow the vein on its dip to the south, and by virtue of their location, the owners of the "Last Chance" claim would have the right to follow the same vein on its dip to the south and west. The result would be the same as in the illustration presented supra in our brief. Both claimants would have a right to the same portion of the vein under different and conflicting titles.

Judge Hallett of Colorado, also a District Judge, in the case of Del Monte Mining Co. vs. New York and Last Chance Mining Co. contends for the same doctrine 65 Fed. Rep. 212, and Judge Hawley in his decision in the case of the consolidated Wyoming Mining Co. vs. Champion Mining Co. 63 Fed. Rep., page 540, so far forgets the Statute law of the United States, and the rules laid down by the Supreme Court in construing such law, that he actually gives to the owners of the Wyoming and Ural lodes the right to follow their vein on its dip into the earth, between planes drawn down vertically through end lines which are *not parallel*, But these District Judges are confronted by Judge Knowles in the 49 Fed. Rep., page 291, in which he adopts the views expressed by the Supreme Court of the United States in the several cases where the question or similar questions have

been passed upon, and the learned Judge comes to the conclusion that it is no longer a debatable question. That where a vein passes through one end line and one side line of a claim, the owner has no right to follow such vein on its dip into the earth. The learned Judge in the decision uses this language:

"If it should appear that the apex of the "Blue "Bird" claim did not pass through the end lines of "that claim, but passed through *one end line and one* "*side line*, then the rights of the plaintiff at least are "determined by the case of "Iron Silver Mining Co. "vs. Elgin Mining & Smelting Co., 118 U. S. 196." "* * * The right of plaintiff to follow its vein "outside of its side lines if its apex is *not cut by both* "*end lines* of its claim, was fully determined in the "case just referred to."

It is exceedingly dangerous to Courts to begin to legislate in their decisions, or formulate judicial law to meet all the conditions which may arise upon any given question. The proper law-making authority is the legislative department, where a Statute is enacted by Congress or the Legislature in plain unequivocal terms, such as the law of May 10th, 1872, relating to the disposal of the mineral lands of the United States, there can be no legitimate reason for the Courts trying to evade or change that law. If changes are required, it should be done by legislative enactment and amendment. The danger to be encountered from

judicial legislation or decisions making new and different rules of construction is evident, for with the varying imagination of each Court or Judge, we may have a different rule or construction placed upon the law. The law as it is written in our Statutes should be followed, and where, as in this case, the question has been exploited and promulgated by the highest judicial tribunal in the land, the doctrine so announced should not be evaded by subterfuge by the lower Courts. Upon this question we see that Judge Hawley in the case of the Wyoming Consolidated Mining Co. vs. Champion Mining Co., 63 Fed. Rep. page 540, actually dispenses with section 2322 of the Rev. Stats. of the United States, which requires that the end line of a mining claim shall be parallel, and allows the claimants of a mining claim with end lines which are *not parallel* to follow the same on its dip into the earth, and the Supreme Court of Montana, as well as Judge Beattie, place themselves by their decision upon the dangerous ground of giving the two separate claimants the right to one and the same portion of a lode or vein, such claimants holding by different and conflicting titles. If this Court shall give to the case that consideration which we think the importance of the question demands, we are satisfied it can arrive at but one conclusion, and that judgment, will be in accordance with the doctrine so ably discussed in the case of King vs. Amy & Silversmith Mining

Co., supra. It is to be regretted that this question was not decided by this Court when it was presented in other cases, for such a decision then would have prevented an appeal in this case, but as it has never been decided, we trust the Court will lay down for future guidance a rule which will govern the rights of parties where the apex of a vein shall pass through one of the end lines and one of the side lines of the surface location of the claimant.

When such a rule is finally established, Attorneys and their clients will be advised of their rights. We feel constrained to believe that the rule should be established as we contend for in this brief, and relying upon the judgment and wisdom of this Court, we respectfully submit that the opinion of the Supreme Court of Montana should be reversed, with instructions that the defendants in error have no right to follow their vein on its dip or incline outside or beyond planes drawn vertically downward through the surface lines of their location.

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